COMMENTS ON AMENDMENTS TO PARAMETERS AND GUIDELINES

Peace Officer Procedural Bill of Rights
05-RL-4499-01 (CSM 4499)

BY THE CITY OF SACRAMENTO

I, Dee Contreras, state:

That I am the Director of Labor Relations for the City of Sacramento, which position I have held since November 1995. From 1990 until November 1995, I was the senior labor relations representative for the City of Sacramento. In these positions, my duties include negotiations with unions pursuant to the Meyers-Milias-Brown Act, contract administration, processing grievances, discipline review for police and fire, as well as miscellaneous employees[1]. Thus, I have been personally responsible for review of police discipline matters. In these positions, I have been involved in all areas of labor relations.

I have been involved in the labor relations area since 1980. I was a labor union representative from August of 1980 until June of 1990. I represented employees in disciplinary actions and hearings. I represented and defended the employees and unions in grievances. I negotiated and reviewed civil service rules and their application. I was thus involved in all aspects of labor relations from the union side for this period of time.

I am also an attorney, who has been licensed to practice in the State of California from November, 1979.

1. Comments on Department of Finance's Recommended Reasonable Reimbursement Methodology

The Department of Finance proposes that each individual agency be audited for a period of four years, and that the audit results, divided by the number of officers, be the Reasonable Reimbursement Methodology (RRM) for that agency, and as a result, each agency would have a separate and distinct RRM.

I do not believe that that is in the best interests of either the State or local government. First of all, there are 58 counties, and approximately 478 cities. The State Controller's Office, at the prehearing herein, stated that based upon its current level of staffing, it could audit approximately 20 entities per year. At that rate, it would be in excess of 20 years before there would be four years of audit data for all entities, assuming the audits were timed such that four years of audit data could be obtained in one audit.

[1] Miscellaneous employees are those that are not safety employees, i.e. those that are not sworn police and fire.

Not only would it consume an extraordinary amount of state time and costs to conduct the audits, but in the interim, those entities which have not been audited would still be completing the onerous actual reimbursement claim forms, whereas others would only have to multiply their RRM times their rate per officer.

This is not practicable, and does not meet the standard of Government Code, Section 17557(f), which requires the RRM to balance accuracy with simplicity. This process is not simple.

Furthermore, the problem is compounded by the fact that there are substantial differences in interpretation of the Parameters and Guidelines between local government and the State Controller's Office. It is quite conceivable that if these differences are not rectified prior to the audit of all 58 counties and all 478 cities, that incorrect reduction claims would have to be determined prior to a RRM being established for a given entity.

2. *Comments on the Proposed Amendment to Parameters and Guidelines Submitted by the County of San Bernardino*

One of the most contentious issues, to the best of my knowledge, that has arisen in the audits, is the time spent by officers in interrogations. It is my information and belief, that the only time which the State Controller's Office is allowing are overtime hours of the officer being interrogated only. No straight time for the officers interrogating or the officer being interrogated is allowed.

At the original hearing on the test claim in this matter, I testified at length concerning the additional activities imposed by POBR on the interrogation of officers. This testimony is contained at pages 514 *ff.* of the administrative record. To not belabor the point, and quote verbatim from my testimony, these are the issues which I raised at that hearing.

First of all, you cannot discipline an officer without complying with the requirements of POBR. This means, essentially, that if you are going to interview any police officer during the conduct of a disciplinary matter, whether or not that officer is the subject of the investigation, that officer must be afforded his POBR rights. Otherwise, if facts are ascertained during the course of the investigation which result in information showing that the officer who is not the subject of the investigation committed some act, or failed to take some act which could result in disciplinary action, those factors cannot be utilized in any subsequent disciplinary proceeding unless that officer was interrogated and proceedings were had under POBR. Thus, if during the course of the investigation of Officer X it was ascertained that Officer Y failed to report the activities of Officer X, if Officer Y had been interviewed and not afforded his POBR rights, he could not be disciplined for his failure to act. As a result, all sworn personnel interviewed during the course of a POBR investigation must be afforded his or her POBR rights.

The second difficulty posed by POBR is that you must afford the officer being interviewed notification as to what you are investigating and what the complaint is about. This substantially increases the burdens on local government in the conduct of the

investigation. It also hampers the investigation because before you are allowed to interview the person, they know what is being asked. This gives the prospective witness an opportunity to create, reflect or refresh facts that might have come out differently in a straightforward investigation where the subject does not know what you are looking for. These are benefits afforded sworn officers that are not afforded to miscellaneous employees.

As a result, the entire investigation should be completed before you interrogate the officers in question. You cannot "fish" for information in a POBR disciplinary proceeding – all of your work must be done in advance, and more thoroughly than when you investigate potential disciplinary proceedings of miscellaneous employees.

Additionally, police departments are a 24 hour, 7 day a week operation. Because of that factor, it is quite probable that one or more of the officers, either the interrogating officers or the officer being interrogated, will have conflicting shifts. If you are investigating an officer whom you believe to have committed a disciplinary offense, the last thing you want to do is to pay them overtime to accommodate the interrogating officers. Overtime is seen by all officers as a benefit, as it increases their pay. Since you do not wish to reward a possibly offending officer by paying him or her overtime, you will bring the officer in to be interviewed during his or her shift, and, if necessary, pay the interrogating officers overtime. The State Controller's position that they only allow for payment of overtime for the officer being interrogated, in essence, means that offending officers will be rewarded for their misconduct, and is contrary to good public policy.

To that end, the Statement of Decision, commencing on Administrative Record, p. 871, discusses in detail the compensation and timing of an interrogation. To that end, the Statement of Decision states, in pertinent part, as follows:

> Government Code section 3303, subdivision (a), establishes procedures for the timing and compensation of a peace officer subject to investigation and interrogation by the employer. This section requires that the interrogation be conducted at a reasonable hour, preferably at a time when the peace officer is on duty, or during the "normal waking hours" of the peace officer, unless the seriousness of the investigation requires otherwise. If the interrogation takes place during the off-duty time of the peace officer, the peace officer "shall" be compensated for the off-duty time in accordance with regular department procedures.
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> The claimant contended that Government Code section 3303, subdivision (a), results in the payment of overtime to the investigated employee and, thus, imposes reimbursable state mandated activities. The claimant stated the following:

> "If a typical police department works in three shifts, such as the Police Department for this City, two-thirds of the police force work hours [that are] not consistent with the work hours of Investigators in the Internal Affairs section, Even in a smaller department without such a section, hours conflict if command staff assigned to investigate works a shift different than the employees performing the required investigation, or is at least a potential risk to an employer for the time an employee is interrogated pursuant to this section."
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> The Commission agreed. Conducting the investigation when the peace officer is on duty, and compensation the peace officer for off-duty time in accordance with regular department procedures are new requirements not previously imposed on local agencies and school districts.
>
> Accordingly, the Commission found that Government Code section 3303, subdivision (a), constitutes a new program or higher level of service under article XIII B, section 6 of the California Constitution and imposes "costs mandated by the state" under Government Code section 17514.

It should not matter to the Commission, or the State Controller, which officer is compensated for overtime. It should be at the discretion of the local agency, and is in keeping with the Statement of Decision. This is further edified by the Conclusion of the Commission, found on A.R. 884, that "Conducting an interrogation of a peace officer while the officer is on duty, or compensating the peace officer for off-duty time in accordance with regular department procedures. . . " It should also be noted that this does not restrict claiming to only overtime costs. However, the Commission neglected to include straight time in the formation of the parameters and guidelines, which does not comport with the Statement of Decision.

Another major issue is providing notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Statement of Decision, p. 884.) This is a substantial issue, as it must be carefully crafted in order to afford the officer the notice required by POBR, such that information gleaned from the interrogation can be utilized. Again, I testified at length the problems with regard to giving such notice, which is not required to be given in such a manner to miscellaneous employees under *Skelly*. This resulted in the reimbursable activities in the Parameters and Guidelines, A.R. 1276-1277.

These specific activities, identified above, were discussed at length and briefed during the administrative process. However, the unduly restrictive review that has been given same by the State Controller has resulted in denial of costs actually incurred.

Accordingly, it is respectfully requested that the changes requested by the County of San Bernardino be adopted by the Commission, which accurately reflects what transpired at the various hearings herein.

3. *Comments on the Proposals by CSAC and County of Los Angeles*

The City of Sacramento has no problems with the proposals put forth by either CSAC or the County of Los Angeles.

4. *Comments to the proposal of the State Controller's Office*

It is respectfully submitted that the proposal of the State Controller's Office is much too narrow, and attempts to place into the Parameters and Guidelines what, I am informed and believe, it is attempting to accomplish in its audits.

a. Administrative Activities

The proposal concerning administrative activities and updating the cases is much too narrowly drawn. There are strict time constraints imposed by POBR: if the time limits are not met, the case must be dismissed and no discipline can be imposed. Therefore, not only must the case files be updated, but they must be reviewed in order to make sure that all deadlines have been meet. To restrict the language as desired by the Controller would make it next to impossible to assure that the time limits set forth in POBR are met. In order to make sure that the time lines are met, the case must be reviewed at various points in order to make sure that all investigations are completed, as well as to make sure all interrogations are completed timely. This is reasonably necessary in order to make sure that the time lines are met.

b. Administrative Appeal

This proposal is much too narrowly drawn. Administrative appeal applies **only** to those situations where a hearing is not required by *Skelly.* Accordingly, prior preparation, review and investigative costs are necessary. Absent POBR, these hearings would not take place at all. Thus, investigation and case preparation is imperative. So, too, defense of litigation is also reasonably necessary. If the employer wins at the administrative level and the employee wishes to contest, the only alternative is litigation.

c. Interrogations

If this section is adopted as written by the State Controller, no costs would ever be claimable for the costs incurred in interrogations. Accordingly, it is necessary to review the items stated therein.

First of all, the statement: "Claimants are not eligible for reimbursement under interrogation when a peace officer being investigated under POBAR is not subjected to an interview or interrogation, but is subject to possible sanctions" makes no sense

whatsoever. It may be possible during the investigation and interrogation of other officers to ascertain that the officer, who is the subject of the investigation, did not commit the misconduct at issue, but was done by another officer. If the interrogation involves a witness officer, to whom the POBR rights attach, the interrogation should be compensable.

Furthermore, the exclusion of the interrogator's time is not reasonable, nor is it reasonably related to the discharge of the mandate. As shown in the testimony I presented at the various hearings, the effort needed to conduct an interrogation under POBR is far more difficult and time consuming than an interrogation of a miscellaneous employee under *Skelly.* First of all, the officer has the right to have a representative present. This means that often the representative will call for a recess or ask questions of the interrogator, which prolongs the questioning. Additionally, given the presence of the representative, it often takes much longer to get at the issue in question, and the preparation for such an interrogation takes much longer. These additional efforts are required by the constraints placed upon the employer by POBR, and are not in existence with *Skelly* proceedings.

With regard to prior notice, it is imperative that it not be just the identification of the investigating officers, but determining who will, in fact, do the questioning. Often determining the investigating officer will have an impact on the outcome of the questioning. Accordingly, limiting the notice to just identifying the questioning officers is far too limited.

We have no problem with eliminating the word "tape" concerning recording, as we understand that other agencies use various media for the recordation. However, we want to make clear that the recordation of the interrogation, regardless of the media, is found to be reimbursable.

We do, however, have a problem with excluding the transcription cost of any peace officer complainant(s). When a peace officer complains, that officer is nonetheless afforded POBR rights, in the event that something he or she says may result in discipline for misfeasance, or more probably, nonfeasance.

With regard to adverse comments, the person who is going to have same placed in his or her personnel file must sign the same document, or have a notation made that the officer refused to sign that document. I believe that the reason for same is because it makes clear that there has been no substitution of documents, or claim that said document has been substituted. As I testified to earlier, there have been occasions when the officer in question writes a long rebuttal to the adverse comment. Of course, this is always done on the employer's time, never on the employee's time. This necessitates review afterwards to see if same comports with POBR. This fact, which I testified to, and was not contradicted, should not be ignored.

The State Controller has also included the following: "The foregoing relates only to peace officers investigated under POBR who were subjected to an adverse comment by

investigation staff." This is not always the situation. There may be occasions when there is an adverse comment, such as a report by an external review board or committee, who requires that the report be included in the officer's file, but which did not result in a POBR investigation. This unfairly limits the employer. There is nothing in POBR which requires that the adverse comment stem from an investigation under POBR: it is merely that there is an adverse comment going to the file. Unfortunately, due to the nature of personnel matters, a comment may be deemed by an employee to be adverse if it is not laudatory.

The statement: "Reimbursement is limited to activities that occurred subsequent to the completion of a case that resulted in an adverse comment recommendation" goes far beyond the POBR law. As noted above, there may not be a "case" which resulted in an adverse comment recommendation.

With regard to the usual "boilerplate", we have no objections to incorporating the usual boilerplate. We do, however, request that with regard to salaries and benefits, that we can specify either the name of the employee or the job classification. The larger the agency, the more important it is that we be able to identify by job classification.

Furthermore, there are other restrictions imposed regarding the ability of others to see the Internal Affairs and personnel files in POBR matters. It should be noted, and understood, that in any audit, that the State Controller will comply with the mandatory confidentiality of these records.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed this 4th day of August, 2006 at Sacramento, California.

Dee Contreras

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